

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JERRY LEE MOORE,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2008

No. 271928

Wayne Circuit Court

LC No. 06-002943-01

ON REMAND

Before: Saad, C.J., and Jansen and Beckering, JJ.

PER CURIAM.

This matter is again before us, on remand from our Supreme Court. *People v Moore*, 480 Mich 1152 (2008). Our Supreme Court has determined that there was sufficient evidence from which a rational trier of fact could have concluded beyond a reasonable doubt that defendant was guilty of being a felon in possession of a firearm, MCL 750.224f. *Id.* We have now been directed to address the remaining issues raised by defendant that were not considered in our first opinion. We affirm defendant's convictions but remand for resentencing.

Defendant argues that reversal is required because the trial court gave clarifying instructions to the jury in his absence and in the absence of his attorney. We disagree. We acknowledge the general rule that "[t]he court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present." MCR 6.414(B). However, the clarifying instructions given to the jury in this case were administrative in nature. *People v France*, 436 Mich 138, 163-164; 461 NW2d 621 (1990); *People v Gonzalez*, 197 Mich App 385, 403; 496 NW2d 312 (1992). The court merely explained that the jury should rely on its own understanding of the ordinary meaning of the term "transport." Indeed, the court had already advised the parties that it would provide clarifying instructions to the jury upon request and the court did not add anything of substance to the initial instructions that it had already given. Defense's counsel failure to object when informed of the court's handling of the jury's question constituted a waiver of any error in this regard. *Id.* at 402-403.

Moreover, even if the clarifying instructions had been substantive, we are firmly and definitely convinced that the court's handling of the jury's question did not prejudice defendant. *France*, *supra* at 163. The court largely restated its earlier instructions and, as noted previously, merely explained that the jury should rely on its own collective understanding to define the word "transport." "[T]ransport" is not a legal word of art that falls outside the common understanding of jurors, see *People v Schaefer*, 473 Mich 418, 441; 703 NW2d 774 (2005), but is rather an

ordinary term that is used by laypersons and has a common and widely recognized meaning. A trial court need not define words with ordinary meanings for a jury. *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). “When a word is not defined by statute, this Court presumes that the word is subject to ordinary comprehension and there will be no error warranting reversal as a result of a trial court’s failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension.” *Id.*; see also *People v Knapp*, 244 Mich App 361, 376-377; 624 NW2d 227 (2001). Furthermore, the court did not improperly instruct the jury to use a dictionary while deliberating. See, e.g., *People v Messenger*, 221 Mich App 171, 178; 561 NW2d 463 (1997). The trial court’s clarifying instructions to the jury reflected an accurate statement of the law.

Nor was defendant deprived of the effective assistance of counsel in this matter. Although defendant’s attorney was absent while the court gave its clarifying instructions to the jury, no automatic presumption of prejudice arises on the facts of this case because the court’s handling of the jury’s question did not constitute a “critical stage” of the proceedings and because the court largely restated its earlier instructions without providing any new or additional substantive direction. See *Hudson v Jones*, 351 F3d 212, 217-218 (CA 6, 2003). Thus, defendant’s claim that his attorney was ineffective for failing to appear during the court’s handling of the jury’s question must be assessed under the test of *Strickland*<sup>1</sup> rather than under the test of *Chronic*.<sup>2</sup> *Hudson*, *supra* at 217-218.

Under the test of *Strickland*, even assuming that counsel’s absence during the court’s clarifying instructions was deficient, defendant has not meet his burden of establishing a reasonable probability that the result of the proceedings would have been different had his attorney been present. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Similarly, defendant has not established a reasonable probability that the result of the proceedings would have been different had counsel objected to the court’s clarifying instructions to the jury. *Id.* As noted previously, the clarifying instructions were largely a restatement of the earlier instructions and accurately stated the law to the members of the jury.

We affirm defendant’s convictions. However, we remand for resentencing for the reasons stated in our initial opinion in this matter. *People v Moore*, unpublished opinion of the Court of Appeals, issued November 27, 2007 (Docket No. 271928), slip op at 2-3. The trial court proceeded under the misapprehension that it was entitled to impose consecutive sentences in this case. Even though defendant ultimately received identical, concurrent sentences for his two convictions, we cannot determine whether the trial court would have imposed these same sentences in the absence of the inaccurate information relied on at the time of sentencing.

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<sup>1</sup> *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

<sup>2</sup> *United States v Chronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane M. Beckering